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Nos. 07-588, 07-589, & 07-597 (Consolidated)

In The
Supreme Court of the United States

ENTERGY CORP., PSEG LLC AND
PSEG NUCLEAR LLC, AND
UTILITY WATER ACT GROUP,

Petitioners,

v.

RIVERKEEPER, INC., *et al.*,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

AMICUS CURIAE BRIEF OF THE STATE OF NEBRASKA, ET AL. IN SUPPORT OF THE UTILITY WATER ACT GROUP

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INTEREST OF AMICI CURIAE STATES

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1972), represents a highly successful example of cooperative federalism in the area of environmental protection. State water pollution control agencies exercise primary responsibility for implementing its provisions.[1] They are charged with carrying out ambitious and complex water pollution control programs, which the nation depends upon to protect water supplies, recreational areas, aquatic life and other uses of our water resources.

The interests of the amici curiae states are twofold. *First*, the CWA is one of several federal environmental statutes that embody a cooperative federalism structure. The Second Circuit's reasoning would erode the cooperative element of cooperative federalism and lead inexorably to the conclusion that cooperative federalism is a facade. *Second*, the amici curiae states have a strong interest in continuing their longstanding practice of holistically managing the resources within their state and considering both costs and benefits in establishing the "best technology available" as part of their permitting duties. The Second Circuit's vision of the CWA would bar states from using cost-benefit analysis to both manage

[1] The State of New Mexico has not yet been granted primacy under the Clean Water Act by EPA. Nevertheless, it shares the interests of the other amici curiae states both as to the Clean Water Act and as to other federal environmental statutes that embody cooperative federalism.

natural resources and maximize the environmental and economic benefits from electric generating facilities in their states.

SUMMARY OF ARGUMENT

The Second Circuit's strict application of a "one size fits all" philosophy eliminates the principle of cooperative federalism between state permitting agencies and the federal government. Given the wide range of circumstances that impact whether a particular cooling system is appropriate for a given intake structure, EPA and state permitting agencies must have discretion to compare costs and benefits to determine the appropriate technology to require of an intake structure. Section 316(b)'s plain language does not prohibit cost-benefit analysis, and prior case law and other environmental statutory provisions support the conclusion that cost-benefit analysis is a critical tool for determining the "best technology available for minimizing adverse environmental impact." The evisceration of this essential principle of the CWA supports the reversal of the Second Circuit's erroneous interpretation of § 316(b).

The Second Circuit held that EPA is prohibited from comparing cost and benefits in determining the "best technology available for minimizing adverse environmental impact" from cooling water intake structures, beyond simply selecting the less expensive of two equally-effective technologies. In so holding, the Second Circuit eliminated a critical tool used

by both EPA and state permitting agencies to determine the "best technology available," a tool that considers the site-specific factors affecting a particular structure on a particular water source. Given the wide range of circumstances that impact whether a particular cooling system is appropriate for a given intake structure, EPA and state permitting agencies must have discretion to compare costs and benefits to determine the appropriate technology to require of an intake structure.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION UNDERMINES FUNDAMENTAL PRINCIPLES OF COOPERATIVE FEDERALISM.

The Second Circuit's decision should be reversed because it upsets the relationship Congress intended to engender between the federal government and the states under one of this country's most important and pervasive environmental laws: the Clean Water Act. The CWA represents a highly successful example of cooperative federalism in environmental protection. Under the CWA, state water pollution control agencies exercise the primary responsibility for implementing its provisions. They carry out ambitious and complex water pollution control programs on standard setting, permitting and enforcement, total maximum daily load (TMDL) development, watershed protection, water quality monitoring, assessment, and data management, which the nation depends upon to protect its natural resources.

A. The Role of Cooperative Federalism in American Environmental Law.

The Second Circuit's decision in this case upsets the fundamental federal-state relationship Congress established in the Clean Water Act. Congress designed the CWA as "a partnership between the States and the Federal Government" to curb and control pollution of the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 1054 (1992); *see also Save the Bay, Inc. v. EPA,* 556 F.2d 1282, 1284 (5th Cir. 1977) (explaining that the Clean Water Act "joined the Environmental Protection Agency and the fifty states in a . . . pollution battling alliance"). This Court has termed such legal regimes "program[s] of cooperative federalism." *New York v. United States*, 505 U.S. 144, 168, 112 S. Ct. 2408, 2424 (1992), (quoting *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.,* 452 U.S. 264, 289, 101 S. Ct. 2352, 2366 (1981)).[2]

"Cooperative federalism rose with the New Deal, when the national government significantly heightened its presence in the operation of state programs." Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. Envt'l L. J. 179,

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[2] Other critical environmental statutes animated by cooperative federalism principles include the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(w)(1)(a), the Safe Drinking Water Act, 42 U.S.C. § 300(g)(2)(a), the Resource Conservation and Recovery Act, 42 U.S.C. § 6947(a), and the Clean Air Act, 42 U.S.C. § 7410(k)(3).

185 (2005) ("Fischman"). Since that time, "cooperative federalism typically appears as congressional or administrative efforts to induce (but not coerce or commandeer) states to participate in a coordinated federal program." *Id.* at 184. Cooperative federalism has "emerged from its significant but transient status to become an enduring, organizing concept in environmental law[,]" which has "proven the most fertile ground for creating variations on the theme of cooperative federalism." *Id.* at 187, 188.

"Starting most notably with the environmental protection statutes passed in the 1970's, federal regulatory programs increasingly have relied on state agencies to implement federal law." Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1695 (2001) ("Weiser"). "A critical feature of cooperative federalism statutes is the balance they strike between complete federal preemption (a preemptive federalism) and uncoordinated federal and state action in distinct regulatory spheres (a dual federalism)." *Id.* at 1697. "Rather than preempting the authority of state agencies . . . , cooperative federalism programs invite state agencies to superintend federal law." *Id.* at 1695.

As one scholar explains:

> [U]nder the foundational pollution laws, the Clean Air Act ("CAA") and the [CWA], cooperative federalism involves programs where federal monies are made available to each state contingent on its creation of a

> regulatory scheme that is at least as stringent as the federal floor. States may tailor federal standards (e.g., water quality criteria under the CWA), establish compliance strategies (e.g., state implementation plans under the CAA), implement permit programs (e.g., state pollutant discharge elimination systems under the CWA) and enforce rules (e.g., state administrative and judicial procedures.).

Fischman at 189.

There are two key elements to the brand of cooperative federalism embodied in the CWA: "(1) the fostering of state administrative programs, and (2) the delegation of tailored standard-setting." Fischman at 190. "In some cases, the cooperative federalism statute takes the form of allowing state law to operate within a federal scheme. Under the [CWA] for example, state agencies . . . are authorized to administer their own regulatory program under the mantle of federal law." Weiser at 1696 n.16, citing 33 U.S.C. § 1342.

Under the "flagship pollution control programs" like the CWA, states are allowed "to implement their own permit schemes in place of a federal permit requirement." Fischman at 191, citing 33 U.S.C. § 1342. Cooperative federalism also fosters diversity in federal regulatory programs, which Congress has seen fit to promote for at least three reasons: "(1) to allow states to tailor federal regulatory programs to local conditions; (2) to promote competition within a

federal regulatory framework; and (3) to permit experimentation with different approaches that may assist in determining the optimal regulatory strategy." Weiser at 1698.

B. The Clean Water Act Is An Exercise In Cooperative Federalism.

Under the CWA's program of cooperative federalism, state water pollution control agencies are primarily responsible for the statute's implementation. *See* 33 U.S.C. § 1251(b) (acknowledging that it is the states' "primary responsibility[y] . . . to prevent, reduce, and eliminate pollution"). Management of the nation's natural resources depends on the leading efforts of the states. Forty-six states operate permitting programs for point-source discharges into state waters through the National Pollution Discharge Elimination System ("NPDES"). *See* CWA § 402(b); 33 U.S.C. § 1342(b). Under this program, discharge of most regulated pollutants into the waters of the United States is illegal without a valid NPDES permit. States may also apply more stringent effluent limitations in their NPDES permits than those set by EPA. *See* 33 U.S.C. § 1370. States implement § 316(b) through the NPDES permitting program.

II. THE STATES CAN BEST DETERMINE HOW TO MINIMIZE ADVERSE IMPACT.

Congress gave the States the primary role in implementing the CWA for a reason – state permitting

authorities are best positioned to judge the needs of local ecosystems and the impacts of particular regulations on a state's natural resources.

A. States Must Have the Authority to Evaluate Site Specific Circumstances in Determining the Appropriate Technology to be Implemented.

EPA's Phase II Rule correctly recognized that it could not take into account the wide variety of site-specific circumstances influencing the nature or impacts of impingement mortality and entrainment in setting the national floor for cooling water intake technology. EPA, therefore, appropriately allowed the states to "tailor [§ 316(b)] . . . to local conditions" and "permit experimentation with different approaches that may assist in determining the optimal regulatory strategy." Weiser at 1698. This included the authority, in circumstances where the costs or benefits of compliance were out of alignment with EPA's national performance standards, to continue the states' long-standing practice of assessing the impact on a waterbody.

Without the opportunity to provide site-specific compliance options, states lack the authority to make informed choices in balancing resource management considerations. Taking account of local waterbody characteristics is critical for states in writing permits that prescribe the best technology available to minimize adverse environmental impacts.

For example, in some waterbodies, the major fish species that would incur impingement and entrainment mortality is invasive. In those waterbodies, the state's best means of maintaining the native aquatic organisms at that site is by writing permits that prescribe once-through cooling technologies.[3] Similarly, in states containing waterbodies with essentially minimal aquatic life, the Second Circuit's decision would require technology to protect aquatic organisms that are not present.[4]

As another example, eliminating the states' ability to make site-specific decisions could have adverse impacts on Florida's West Indian Manatee population, a federally listed endangered species. Currently, Florida has numerous steam electric power plants utilizing once-through cooling water systems. These systems take in large quantities of water for cooling purposes and therefore discharge a large quantity of warmed water to surface waters throughout Florida. While manatees are not impacted by impingement or entrainment from cooling water intake structures, they do find refuge in the warm water discharge areas of 12 Florida steam electric

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[3] 65 Fed. Reg. 29,073 n.13 (Aug. 10, 2000); 72 Fed. Reg. 37,459-69 (July 10, 2007).

[4] DCN:1-3003-BE at 308 (1974-75 impingement sampling at Big Rock Nuclear Station in Michigan produced only 326 fish weighing 49 pounds total); DCN:2-3021-BE at 207 (1974-75 impingement sampling at Ghent Electric Generation Staten recovered only six fish).

power plants during the winter season. For over 60 years manatees have come to depend on these historically consistent, warm water refuges. It is estimated that 60% of the Florida manatee population use these areas during the winter months. If these warm water areas suddenly disappear as a result of Florida's inability to consider site-specific conditions, the Florida manatee population could suffer significant losses due to their dependence on these sites and their inability to quickly adapt to alternative warm-water habitat.[5] Preserving the states' ability to account for site-specific conditions instead of requiring a "one size fits all" technology, would enable Florida to continue considering the effects on manatees in order to develop long-term solutions when determining the best technology available.

Finally, in western and drought-stricken areas, where water supplies are scarce, states must be allowed to consider technologies that ensure that the minimal water necessary is consumed.[6] Section 316(b) does not plainly require EPA and the states to ignore these and other site-specific conditions, and state permitting authorities should be afforded considerable discretion to consider them when deciding what is the "best technology available."

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[5] Fla. Dept. of Environmental Protection's Comments on EPA's Proposed Reg. for NPDES Cooling Water Intake Structures at Phase II Existing Facilities (Aug. 7, 2002).

[6] 1 *Leg. Hist.* at 263 (statement of Representative Clausen) (1973).

The Second Circuit's decision requires EPA and State permitting agencies to affirmatively ignore legitimate alternatives and will have potentially devastating effects on local and regional energy costs and reliability. State permitting authorities will be required to prescribe cooling systems at electricity generating facilities that are costly to install and that reduce the useable energy output of the plant. These two factors will substantially increase energy costs that, in many cases, will be passed on to residential, industrial, and commercial consumers. Such increases will be especially problematic due to the high costs of other available energy sources, including crude oil, heating oil, gasoline, and natural gas, which are currently at, or near, record highs. By its very terms, the Second Circuit's decision ensures that none of those costs and impacts will be justified by corresponding benefits.[7]

[7] The only ostensible limitation set forth in the Second Circuit's decision arises when an industry cannot "reasonably bear" the cost of a particular technology. This exception suffers from the same "one-size-fits-all" flaws of the Second Circuit's rationale. In Nebraska, for example, electrical power is not produced by private industry, but rather is the responsibility of a political subdivision of the state. The citizens of Nebraska elect the boards of the local power districts and Nebraska citizens will bear the burden of the rigidity of the Second Circuit's decision.

B. States Implement a Holistic Approach to Regulation of the Power Industry.

The Second Circuit's decision also upsets the holistic approach states use to regulate the power industries within their borders.[8] In eliminating cost-benefit considerations from the analysis of the proper cooling system to implement, it is as if the Second Circuit has presumed that § 316(b) operates within a vacuum. Instead, § 316(b) is merely one piece of the extensive regulatory authority vested in states: states may also impose their own water quality standards and thermal discharge limits on power plants and may also grant variances when the situation warrants.[9] For many years the states have been evaluating these structures and managing them carefully. Stepping back from this approach now would produce serious consequences.

Implementing the lower court's decision could require state permitting authorities to write permits that will adversely affect other aspects of the environment, which states are charged with protecting. For instance, the Second Circuit's decision could

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[8] *See South Carolina v. North Carolina*, Original Action in Front of the United States Supreme Court, 2007 WL 2826231, pp. 4-5 (June 7, 2007) ("Solving . . . problems [arising out of a shortage of water] is beyond the capabilities of any one agency or group and . . . cooperative efforts between the various stakeholders in the Catawba River Basin will be necessary to protect the Basin's water resources.")

[9] NPPD Variance cited in MO River Brief.

require states with ozone pollution problems, but healthy waterbodies, to mandate closed-cycle cooling because the ozone precursor-impingement mortality tradeoff was not sufficiently great on a national level to allow EPA to provide for once-through cooling. The resulting increase in production by the facility, to compensate for the power penalty imposed by closed-cycle cooling would exacerbate the ozone precursor problem while the environmental benefits to the already-healthy waterbody would be nominal.

Mandating closed-cycle cooling will also have substantial negative impacts on residents and businesses of the Amicus States. EPA determined in the Phase II Rule that requiring existing power plants to retrofit would cost $2.26 billion and close nine power plants. At a time when power supplies are under stress nationwide and electric producers are faced with a host of new requirements under the Clean Air Act and CWA, requiring EPA and State permitting agencies to ignore the cost of regulations in comparison to the benefits will force the industry to make adjustments in production. The resulting adjustment will inevitably have dire consequences for the public in both the amount of electricity generated and the costs to acquire that electricity.

Amicus States are not seeking that all states be *required* to initiate a cost-benefit analysis whenever environmental requirements are considered, including under § 316(b). However, states should not be *forbidden* from considering costs and benefits when such a tool could help reach better decisions. The

diverse interests and conditions present in the amici curiae states provide an accurate portrait of the importance of the flexibility provided by EPA's interpretation of § 316(b).

As a practical matter, the Second Circuit's decision will force the states to impose the most stringent intake structure requirements that can be technically accomplished. As a result, states are prohibited from taking into account local waterbody characteristics in determining what technology is the "best," and are similarly prohibited from considering costs and benefits. Such a stripping of the states' ability to consider the costs and benefits in determining the appropriate cooling system to be implemented at a site-specific location, and upholding a ruling which would require most power plants to convert to a closed-cycle cooling system, would upset the careful regulatory balance implemented by the states.

CONCLUSION

The Second Circuit erred in ruling that EPA and the states were prohibited from considering costs and benefits to determine the "best technology available for minimizing adverse environmental impact" from cooling water intake structures. The Second Circuit's decision impairs the CWA's cooperative federalism by disempowering states from requiring the technology that best suits the needs of the particular site in question. Additionally, without the ability to use a

cost benefit analysis, the increased costs and other consequences associated with installing new cooling water intake systems will not be justified by any determination of corresponding benefits to the ecosystem and species affected. For the foregoing reasons, the amici curiae states respectfully request that this Court uphold EPA's consideration of costs and benefits as appropriate under § 316(b) and reverse the ruling of the Second Circuit.

Respectfully submitted,

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